

Professional Liability Insurance Disclosure



Hearing Report Lubbock, October 29

By Kevin Priestner

Nine lawyers braved cold, wet conditions to testify at a public hearing in Lubbock on whether lawyers should be required to disclose to clients if they carry professional liability insurance. Eight of the nine voiced opposition to a disclosure requirement; one expressed her support. The Supreme Court of Texas has asked the State Bar Board of Directors to recommend whether such a policy should be adopted. The Board will vote in January.

Three West Texas lawyers who serve on the Board of Directors attended the hearing — Guy Choate of San Angelo, David Copeland of Midland, and Kyle Lewis of Dumas. State Bar President Roland Johnson of Fort Worth and his immediate predecessor, Harper Estes of Midland, provided background on why the hearing was taking place and answered questions put to them by members of the audience. Jonathan Smaby, executive director of the Texas Center for Legal Ethics, moderated. Recordings of the Lubbock hearing and the five previous public hearings around the state are available at www.texasbar.com/plidisclosure.

Among the points raised during public testimony:

- A representative of the 100-member Lubbock Criminal Defense Lawyers Association spoke against the proposition. The goal is consumer protection, which is a noble goal, he said, but this is an oversimplified solution. In fact, it's a solution looking for a problem. There is no public outcry on this issue. The only people in favor I know of are legal malpractice lawyers, who have a pecuniary interest in the matter. I find the proposal offensive because of the paternalistic aspect. There will be a stigma to solo and small-firm practitioners, especially those who practice criminal defense. Disclosure would be misleading. I can't make sense of these policies and suspect the public won't be able to either. I am also concerned about the impact on pro bono. Consumer protection is a noble goal, but this proposal would only undermine the attorney/client relationship.
- A professor at Texas Tech University School of Law who practiced 13 years before joining the faculty, is coauthor of a legal malpractice book, and is a former chair of the Texas Supreme Court Grievance Oversight Committee, but who was speaking only of her personal views, supported requiring insurance disclosure. If you're buying a car and one model has airbags and another does not, wouldn't you

want to know that? A lawyer with insurance provides a safety net. Doesn't a family deserve to know that? We know that consumers know how to make informed decisions. It comes down to leveling the playing field. As accomplished professionals, we owe the public that duty. We need to elevate public protection over personal preference. You won't hear from many people who support it, but this is not a popularity contest. Consider the message we will send. Do you want to elevate lawyer self-interest over public protection?

- A trial lawyer from Amarillo who is a past chair of the Commission for Lawyer Discipline said requiring insurance disclosure would offer minimal consumer protection. Lawyers already have a fiduciary duty that you disclose important information. That duty is broad and set in case law. It is dangerous to add specific duties on top of the broad fiduciary duty. If lawyers are required to disclose, it follows that they would need to disclose the amount, the deductible, what may or may not be covered, whether the lawyer is current on payments, and on and on. If that plays out, it would needlessly strain attorney/client relationships. Prospective clients are free to ask any questions at the outset. We already have one disclosure requirement -- the existence of the grievance system, which I'm for — we don't need to add another. I am adamantly opposed to putting an insurance disclosure requirement into the disciplinary rules. It has nothing to do with attorney discipline. We would burden of the Office of Chief Disciplinary Counsel. It would be a bad precedent to add something like this. We have withstood adding politicized rules. The next time something comes up, the temptation will be to just add it to the disciplinary rules.
- A self-described "street lawyer" who takes "anything that walks through the door" and served on a grievance committee for five years was opposed to the measure. I'm for ethics and everything to make lawyers better. I've been practicing since 1987 and have never had a client ask whether I have any kind of insurance. If I had, I would not have taken that case. I don't want that client. It's not worth the hassle. Insurance disclosure will leave us like deer with a big target on our backs. Hypothetically, if I donated this facility [the hearing took place in the Donald Hunt Courtroom at the Texas Tech University School of Law Mark and Becky Lanier Professional Development Center] and am self-insured, you're going to punish me? At the other end, you're going to punish those who hang out their shingle? The future of our profession is outside those doors. There's a percentage who will be good lawyers who will not be picked up by law firms. This proposal will hurt them.
- A county attorney who spent 33 years as a trial lawyer in Houston, served on the State Bar Board of Directors, and has "handled my share of legal practice cases" opposed the measure. This idea has been rolling around since at least the 1970s. I have never heard a good argument for it. The word that comes to mind is "specious" -- it has the ring of truth but is false. I am astonished that we're talking about this today. It's like trying to slap down creeping socialism. This is a bad idea. I say amen to the speakers before me. Let's kill this thing now and be done with it.
- A plaintiffs lawyer in Lubbock who said he's "just a lawyer" and doesn't have the pedigree of the speakers before him opposed the proposal. I do disclose that I

carry professional liability insurance during the initial interview. I have never in 33 years had a client -- not one -- ask if I have it. I don't know why it's an issue to the State Bar. I have an idea of why it's important to the Supreme Court. When I tell people, it invites the question: Why are you telling me? It throws muddy water on a good interview. I tell them for a selfish reason: To tell them that I've never had to use it. I don't know why we're here today. I oppose the measure, as does everyone in my office.

- The president of the South Plains Trial Lawyers Association said the organization's 50 members are not in favor of insurance disclosure.
- A Texas Tech alum, also licensed in New Mexico, who has been practicing for 15 years said the proposal is a matter of grave concern to sole practitioners. Lawyers are very much against this proposal. You don't see this requirement of any other profession. There's no requirement that drivers have a bumper sticker indicating they have insurance. Coverage is protected as a trade secret. New Mexico recently adopted a disclosure requirement. I think this is a horrible idea. I opposed it then; I oppose it now. If disclosure is required, it should be done on the State Bar website. Were it not made public, it would not be made into a bargaining chip. We should not be doing this. I have never had a client ask or be concerned about professional liability insurance.
- A young lawyer only a few years out of law school who practices in Tahoka opposed the measure. I went to Baylor for undergrad, SMU for a master's, and Baylor again for law school. I mention this because all three degrees cost a lot of money. Malpractice insurance would be prohibitively expensive. If my clients have to hear that, even if it wasn't an issue when they came through the door, it would become one. That was what I wanted to get away from. I grew up in Dallas. I moved to Tahoka so I wouldn't have to practice in a big firm.